IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
September 18, 2007 Session

MICHAEL A. DEGROAT, JR. v. STATE OF TENNESSEE

Appeal from the Circuit Court for Williamson County
No. CR041732 Robert E. Lee Davies, Judge

No. M2007-00710-CCA-R3-PC - Filed January 9, 2008

The Appellant, Michael A. DeGroat, Jr., appeals the denial of his petition for post-conviction relief by the Williamson County Circuit Court. In 2004, based upon the advice of trial counsel, DeGroat entered guilty pleas to attempted second degree murder, aggravated kidnapping, aggravated burglary, and theft over $1,000, and the trial court subsequently ordered him to serve an effective sentence of eighty-three years in confinement. DeGroat filed the instant petition for post-conviction relief in 2006, asserting ineffective assistance of counsel. After an evidentiary hearing, the post-conviction court found that trial counsel had provided constitutionally effective assistance and denied DeGroat relief. After a thorough review of the record, we conclude that DeGroat was denied the effective assistance of counsel as guaranteed by the Sixth Amendment. Accordingly, we reverse the judgments of conviction and remand with instructions that DeGroat's guilty pleas be vacated and that the case proceed as provided by law.

Tenn. R. App. P. 3; Judgments of Conviction Vacated and Remanded

DAVID G. HAYES, J., delivered the opinion of the court, in which JERRY L. SMITH and THOMAS T. WOODALL, JJ., joined.

Charles B. Griffith, Nashville, Tennessee, for the Appellant, Michael A. DeGroat, Jr.

Robert E. Cooper, Jr., Attorney General and Reporter; Preston Shipp, Assistant Attorney General; Ronald L. Davis, District Attorney General; and Mary Katherine White, Assistant District Attorney General, for the Appellee, State of Tennessee.

OPINION

Factual and Procedural Background

On September 9, 2002, the Appellant was indicted by a Williamson County grand jury for the following charges: attempted second degree murder, a Class B felony; alternative counts of aggravated kidnapping, Class B felonies; aggravated burglary, a Class C felony; theft of property

valued at $1,000, a Class D felony; and misdemeanor assault. The charges stemmed from the August 9, 2002 home invasion into the Williamson County residence of Diane Johnson. Prior to trial, the State extended an offer to the Appellant to plead to the indicted charges in exchange for an aggregate sentence of thirty-nine and one-half to forty years. This offer was rejected by the Appellant upon advice of trial counsel. On the scheduled day of trial, February 25, 2004, the Appellant entered a plea of not guilty to the charged offenses. However, later that same day, after the jury was selected, the Appellant withdrew his not guilty pleas and entered "open" guilty pleas to each of the indicted offenses of attempted second degree murder, aggravated kidnapping, aggravated burglary, and theft over $1,000.[1]

At the sentencing hearing, the victim, Detective Tommy Campsey, and the Appellant testified. At the conclusion of the hearing, the trial court[2] sentenced the Appellant, as a Range III, persistent offender, to twenty-eight years for attempted second degree murder and to twenty-eight years, as a violent offender, for aggravated kidnapping. The trial court also sentenced the Appellant, as a career offender, to fifteen years for aggravated burglary and to twelve years for the theft. The trial court further ordered that all of the sentences run consecutively. The aggregate sentence imposed by the trial court was eighty-three years, which was six years above the State's recommendation at the sentencing hearing. The maximum effective sentence which the Appellant could have received was eighty-seven years. On direct appeal, we affirmed the sentencing decisions of the trial court, but we modified the sentence for aggravated burglary, remanding for entry of a judgment classifying the Appellant as a persistent, rather than a career offender, as to this conviction. *See State v. Michael A. DeGroat, Jr.*, No. M2004-01407-CCA-R3-CD (Tenn. Crim. App. at Nashville, May 9, 2005).

On April 7, 2006, the Appellant filed a *pro se* petition for post-conviction relief which alleged ineffective assistance of counsel. The post-conviction court subsequently appointed counsel for the Appellant, and an evidentiary hearing was held on January 26, 2007. On March 27, 2007, the post-conviction court dismissed the Appellant's petition, concluding that trial counsel's assistance was not ineffective. The Appellant timely appealed.

Analysis

The Appellant argues on appeal that the post-conviction court erred in denying his petition for post-conviction relief. In support of his claim of ineffective assistance of counsel, he raises the following issues, which we have restated for the purpose of clarity: (I) whether trial counsel's representation at the suppression hearing was deficient and resulted in prejudice to the Appellant; and (II) whether trial counsel's advice regarding the Appellant's "open" guilty pleas, following

[1] The alternative prosecutions for kidnapping were merged into a single conviction. Testimony at the sentencing hearing indicated that the misdemeanor assault charge was to be merged; however, the judgment form reflects that this offense was ultimately dismissed.

[2] The judge at sentencing was Judge Heldman.

selection of the jury, constituted deficient performance resulting in pleas which were not knowingly, voluntarily, and intelligently made.

In order to prevail on a post-conviction petition, the petitioner must establish that his conviction or sentence is void or voidable due to the abridgement of a constitutional right. T.C.A. § 40-30-103 (2003); *Howell v. State*, 151 S.W.3d 450, 460 (Tenn. 2004). The petitioner bears the burden of proving factual allegations in the petition for post-conviction relief by clear and convincing evidence. T.C.A. § 40-30-110(f) (2003). Clear and convincing evidence means evidence in which there is no serious or substantial doubt about the correctness of the conclusions drawn from the evidence. *Hodges v. S.C. Toof & Co.*, 833 S.W.2d 896, 901 n.3 (Tenn. 1992).

Both the Sixth Amendment to the United States Constitution and Article I, Section 9 of the Tennessee Constitution guarantee a criminally accused the right to representation by counsel. *State v. Burns*, 6 S.W.3d 453, 461 (Tenn. 1999). The United States Supreme Court and our supreme court have each recognized that the right to such representation encompasses the right to "reasonably effective" assistance, that is within the range of competence demanded of attorneys in criminal cases. *Id.* To establish ineffective assistance of counsel, the petitioner bears the burden of proving both that counsel's performance was deficient and that the deficiency prejudiced the defense. *Goad v. State*, 938 S.W.2d 363, 369 (Tenn. 1996) (citing *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064 (1984); *Overton v. State*, 874 S.W.2d 6, 11 (Tenn. 1994); *Butler v. State*, 789 S.W.2d 898, 899 (Tenn. 1990)).

To prove a deficiency in representation, the petitioner must show that counsel's acts or omissions were so serious as to fall below an objective standard of reasonableness under prevailing professional norms. *Id*. at 369 (citing *Strickland*, 466 U.S. at 688, 104 S. Ct. at 2065; *Baxter v. Rose*, 523 S.W.2d 930, 936 (Tenn. 1975)). Once a guilty plea has been entered, effectiveness of counsel is relevant only to the extent that it affects the voluntariness of the plea. In this respect, such claims of ineffective assistance necessarily implicate that guilty pleas be voluntarily and intelligently made. *See Hill v. Lockhart*, 474 U.S. 52, 56, 106 S. Ct. 366, 369 (1985) (citing *North Carolina v. Alford*, 400 U.S. 25, 31, 91 S. Ct. 160, 164 (1970)). Where a defendant is represented by counsel during the plea process and enters his plea upon advice of counsel, the voluntariness of the plea depends on whether counsel's advice "was within the range of competence demanded of attorneys in criminal cases." *Id.* (quoting *McMann v. Richardson*, 397 U.S. 759, 771, 90 S. Ct. 1441, 1449 (1970)); *see also Baxter v. Rose*, 523 S.W.2d 930, 936 (Tenn. 1975). The evaluation of the objective reasonableness of counsel's performance must be made "from counsel's perspective at the time of the alleged error and in light of all the circumstances, and the standard of review is highly deferential." *Kimmelman v. Morrison*, 477 U.S. 365, 381, 106 S. Ct. 2574, 2586 (1986). When a petitioner claims that the ineffective assistance of counsel resulted in a guilty plea, the petitioner must prove that counsel performed deficiently and that "there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." *Hill*, 474 U.S. at 59, 106 S. Ct. at 370; *see also Walton v. State*, 966 S.W.2d 54, 55 (Tenn. Crim. App. 1997). Unless both deficient performance and prejudice are shown, "it cannot be said that the conviction or . . . sentence resulted from a breakdown in the adversary process that renders the result

unreliable." *Strickland*, 466 U.S. at 687, 104 S. Ct. at 2064. When reviewing trial counsel's actions, this court should not use the benefit of hindsight to second-guess trial strategy and criticize counsel's tactics. *Hellard v. State*, 629 S.W.2d 4, 9 (Tenn. 1982). Counsel's alleged errors should be judged at the time they were made in light of all facts and circumstances. *Strickland*, 466 U.S. at 690, 104 S. Ct. at 2066.

The issues of deficient performance by counsel and possible prejudice to the defense are mixed questions of law and fact. *State v. Burns*, 6 S.W.3d 453, 461 (Tenn. 1999). A trial court's findings of fact underlying a claim of ineffective assistance of counsel are reviewed on appeal under a *de novo* standard, accompanied with a presumption that those findings are correct unless the preponderance of the evidence is otherwise. *Fields v. State*, 40 S.W.3d 450, 458 (Tenn. 2001) (citing Tenn. R. App. P. 13(d)). Conclusions of law are reviewed under a purely *de novo* standard, with no presumption of correctness. *Id*. at 458.

I. Trial Counsel's Representation at Suppression Hearing

The Appellant asserts that the post-conviction court erred in holding that trial counsel's representation at a suppression hearing did not constitute ineffective assistance of counsel. The suppression hearing was held on February 24, 2004, the day before trial was scheduled to begin. The Appellant first contends that trial counsel was deficient by failing to file motions *in limine* in a timely and effective manner and, further, argues that he was prejudiced by these actions "because the failure to have adjudications as to those motions directly influenced counsel's aversion to moving forward with a jury trial." The Appellant also alleges that trial counsel's performance was deficient at the suppression hearing in that he failed to present specific portions of a videotaped police interrogation of the Appellant in support of the motion to suppress.[3] He argues that prejudice resulted from this error, because the failure to support the motion with persuasive evidence largely compromised the option of moving forward with trial.

At the post-conviction hearing, trial counsel testified that he was "a solo practitioner" and that he had been practicing law approximately four years at the time he was retained to represent the Appellant in this case. He explained that he had experience as an assistant public defender and that he had represented criminal defendants in his private practice.

Prior to the suppression hearing, trial counsel informed the trial court that he intended to file certain motions *in limine* and, further, that he had faxed the motions to the district attorney "sometime back." The trial court advised trial counsel that local practice was "not to encourage lawyers to circumvent the local rules by faxing motions *in limine* to D.A.'s the afternoon before trial." The court then instructed the parties to proceed with the hearing on the motion to suppress the Appellant's confession. Trial counsel then questioned Detective Thomas Campsey, who

[3]The evidence sought to be excluded included the Appellant's prior criminal history, pictures and/or statements that trial counsel alleged the State would use to bolster the character and credibility of the victim, and the 911 telephone call made by the victim.

introduced portions of an approximately two-hour long videotape of the interrogation of the Appellant by police into evidence. However, throughout the course of the hearing, trial counsel was unable to locate on the videotape a specific moment prior to the confession in which the Appellant allegedly stated to the police that "he [did not] have anything to say," which trial counsel characterized as an invocation of his right to remain silent. At the conclusion of the hearing, the trial court stated that although the challenged comment was never located, the court would view the entire videotape before making its ruling on the motion to suppress and that it would consider trial counsel's arguments on the motions *in limine* during trial if necessary. The trial court subsequently denied the motion to suppress.

Following review, we find nothing in the record to preponderate against the post-conviction court's finding that the Appellant failed to establish ineffective assistance with regard to the suppression or motion *in limine* issues. The transcript of the suppression hearing and the testimony of trial counsel at the post-conviction hearing both demonstrate that the trial court reviewed the videotaped interrogation of the Appellant in its entirety prior to ruling on the motion to suppress. As to the motions *in limine*, the post-conviction court recognized that "[w]hat [the trial court] decided to do was he ruled on the motion to suppress and then he was prepared to rule on the motions *in limine* as they came up at the trial."

To establish ineffective assistance of counsel under the Sixth Amendment of the United States Constitution and article I, section 9 of the Tennessee Constitution, a petitioner must demonstrate both that counsel's performance was deficient and that the deficiency prejudiced the defense. *Goad*, 938 S.W.2d at 369. A failure to prove either deficiency or prejudice provides a sufficient basis to deny relief on the ineffective assistance claim. *Nichols v. State*, 90 S.W.3d 576, 586 (Tenn. 2002). We conclude that the Appellant has failed to establish prejudice as a result of trial counsel's failure to obtain a ruling on the motions *in limine* before trial or his inability to present specific portions of the videotape to the trial court during the suppression hearing. Accordingly, this issue is without merit.

II. Advice of Counsel Regarding Guilty Pleas

Next, the Appellant argues that deficiencies in trial counsel's representation rendered his assistance ineffective and resulted in guilty pleas that were not knowingly, voluntarily, and intelligently made. Specifically, the Appellant submits that trial counsel misunderstood the law regarding concurrent and consecutive sentencing at the time he advised the Appellant to plead guilty. Citing Tennessee Code Annotated sections 40-35-115(b)(1), (2), (4), and (6), the Appellant posits that trial counsel should have been aware that the Appellant met the statutory criteria for consecutive sentencing and that there was little or no hope of obtaining a concurrent sentence if the open plea agreement was accepted. The Appellant asserts that he relied upon the erroneous advice of counsel in deciding to enter open pleas of guilty to the indicted offenses.

Conversely, the State argues that the record preponderates in favor of the findings of the post-conviction court on this issue. Specifically, the State contends that the Appellant was made fully

aware of the possible sentences he could receive prior to entering his guilty pleas. The State further directs the attention of this court to the post-conviction court's accreditation of trial counsel's testimony where it conflicted with that of the Appellant. Finally, the State submits that trial counsel's advice to plead guilty represented "a sound defense strategy and was not the product of a misunderstanding regarding the law related to sentencing."

In its appellate brief, the State's summary of the circumstances leading up to the Appellant's guilty pleas provides:

> [Trial counsel] discussed with the [Appellant] his charges and the applicable ranges of punishment. . . . Prior to the hearing on the motion to suppress, the State had offered the [Appellant] a sentence of thirty-nine and one-half or forty years. [Trial counsel] explained to the [Appellant] that this meant that, if he accepted the State's offer, he may die in prison. . . . The sentence involved consecutive sentencing. [Trial counsel's] only strategy for beating the State's offer was to convince the trial judge to impose concurrent sentencing. . . . Once the jury was impaneled on the day of trial, the only offer was for the [Appellant] to enter open guilty pleas and have a sentencing hearing. . . .

Trial counsel testified at the post-conviction evidentiary hearing that the State initially offered the Appellant a sentence of thirty-nine and one-half to forty years in exchange for his entry of guilty pleas to the four counts.[4] He claimed that he discussed this offer with the Appellant and further recalled as follows:

> In addition in discussing that with [the Appellant], as I mention to all my clients when we discuss this in particular, the average life expectancy if you're in the State penitentiary is no greater than 62 years old. So in effect [the Appellant] would probably die in prison.[5] Based on his prior record we had discussion that there was [sic] the chance of him getting early parole or early release was very unlikely. In the particular offer itself, [District Attorney] Smith had articulated that several of the charges were running consecutive as opposed to concurrent and that's how it came to the total of 39 and a half, 40 years.
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> . . . .
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> Our whole strategy was that if we could get the judge to agree to run it concurrent . . . the only way to beat that offer, we would probably be looking at

[4] At the post-conviction hearing, the Appellant stated that he was never offered a plea agreement for thirty-nine and one-half to forty years. He testified that when he pled guilty, he believed that the maximum sentence he could receive for all four convictions was "thirty, thirty-five years."

[5] At the time of entry of his guilty plea, the Appellant was twenty-nine years of age.

approximately 25 years which means [the Appellant] would get out when he was approximately 50.

Trial counsel further testified that initially it was his objective to defend against the charge of attempted second degree murder at trial by calling a nurse and other medical personnel who had attended the victim for treatment of her minor injuries to "hopefully show the jury that [the Appellant] did not attempt to murder this individual."[6] Trial counsel testified that, despite the trial court's denial of his motion to suppress on the morning set for trial, he did not consider this ruling detrimental to his defense strategy with regard to the attempted second degree murder charge, stating:

> Ultimately when we lost the suppression, it – I didn't consider it detrimental because we got to play the tape to the jury. The jury would have saw [sic] [the Appellant] articulate over and over, I never meant to hurt her, I was never going to do anything to hurt her, I've never hurt anybody, I'm not that kind of person, those kinds of things, and so if – my trial strategy was if I won [the motion to suppress], great, but if I didn't, I was going to use every ounce of [the Appellant] saying how he was not going to hurt this person to defeat that attempted murder two charge.

Trial counsel recalled that at the start of the trial, the Appellant entered pleas of not guilty in the trial court, that he was prepared to proceed to trial that day, and that he planned to call the nurses as witnesses for the defense "because at that point [the] strategy still was to beat the attempted second degree murder" charge. After *voir dire* was conducted and the jury was selected, however, trial counsel testified that he changed his strategy and advised the Appellant to enter "open" guilty pleas to the indicted offenses. Trial counsel recalled that "it was probably one of the worse [sic] jury pools we could have picked" and "that was going to be a huge detriment to [the Appellant]'s case." Testimony in the post-conviction court on this issue was as follows:

> [Trial Counsel]: . . . [W]e took a break right after empaneling the jury. We went back to discuss possible settlement again and at that point the offer was to plead open. . . .
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> [The Court]: Okay. And actually what happened then, the offer changed once they empaneled the jury?
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> [Trial Counsel]: Correct.
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> [The Court]: Plead open and take your chances?

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[6] The victim was questioned by trial counsel at the sentencing hearing in this regard, and she testified that she recalled telling medical personnel that her pain level, on a scale of "one" to "ten" with "ten" being the most severe, was a "two." She testified that she experienced a sore throat, bruising, and the loosening of her front teeth as a result of the Appellant's acts.

[Trial Counsel]: Correct.

. . . .

[Trial Counsel]: In discussing that matter with [the Appellant], not putting the victim on the stand, not having to go through with the trial would gain some leniency from the Court as it was expressed to me and in my opinion I believed it to be so. And the fact that there was going to be a tape where [the Appellant] confesses to choking the victim as well as the victim's testimony, his fingerprints, that there was no way he was not going to be found guilty. Perhaps the only charge we could beat, as I said, was the attempted second degree murder.

With regard to his advice to the Appellant that he plead guilty and his chances of receiving concurrent sentences, trial counsel testified:

Q. And you thought there was a chance that they would be run concurrently?

A. Yes.

Q. And what was that based on?

A. Based on my understanding of the law and the facts of [the Appellant]'s prior records, it was our – and the fact that I believed that he was going to be found guilty, it was our only chance. And I thought, as I advised him, that if we didn't go through with trial, Judge Heldman would lean a little bit more that way.

Trial counsel subsequently reiterated that, at the time he advised the Appellant to plead guilty, he believed that the Appellant "had a very good chance to get concurrent" sentencing and that he "had an excellent legal argument to get the cases run concurrent versus consecutive."

According to trial counsel, later that same day, the Appellant signed a written form captioned "Negotiated Plea Agreement" in which he agreed to plead guilty to attempted murder in the second degree, aggravated kidnapping, aggravated burglary, and theft over $1000. On these forms, a recommended sentence was not written in the corresponding blanks, rather, the phrases "OPEN PLEA" and "sentence determined at sentencing hearing" were handwritten by trial counsel. The record indicates that the trial court questioned the Appellant regarding his petition for waiver of trial by jury and request for acceptance of plea of guilty, and the Appellant stated that he understood the entire contents and effect of these documents.[7]

[7] The trial court advised the Appellant of the possible ranges for each count and asked if he understood each, to which the Appellant responded in the affirmative. However, in describing each possible sentence range to the (continued...)

In denying the Appellant's petition for relief based upon his claim of ineffective assistance of counsel resulting in involuntary guilty pleas, the post-conviction court made the following findings which are germane to our analysis:

> 3. At trial, [trial counsel] was prepared and ready. Witnesses had been subpoenaed at the request of the defense to attack the charge of Attempted Second Degree Murder, the most serious charge. [Trial counsel] correctly determined that the jury selection hurt the [Appellant]'s case. Individuals in the venire had experiences similar to that of the victim and law enforcement backgrounds. Picking the jury crystallized what the [Appellant] was facing. [Trial counsel] demonstrated mature judgment by knowing when to call time-out and re-evaluate. After the jury had been selected, the issue of sentence became more important than the issue of guilt. By entering an open plea, the defense hoped the judge would credit the [Appellant] for not requiring the victim to go through a trial and taking responsibility for his actions.
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> 4. The proof shows that [trial counsel] discussed with the [Appellant] the possible sentence, including the [Appellant]'s range and the possibility of concurrent and consecutive sentencing. Hand-written notes of trial counsel show that the [Appellant] was advised of Range III and Career offender [sic] where the [Appellant] could receive 30 years on the most serious charge. The [Appellant] knew the State had filed a Notice of Enhancement.
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> . . . .
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> 6. At the sentencing hearing, it is clear from the transcript and the questions asked by [trial counsel] that he and the [Appellant] recognized the [Appellant] was looking at 20 to 30 years as a Range III. The fact that [the trial court] ran the sentences consecutive rather than concurrent would not have been different if the [Appellant] had been convicted at trial in that decision was based upon the law and the [Appellant]'s prior record. The [Appellant] knew the issue of concurrent or consecutive sentencing prior to entering his plea. The consecutive sentence was challenged on appeal, but unsuccessful.

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[7](...continued)
Appellant, the trial court erroneously advised him that he would be subject to the range corresponding with a Range I, standard offender for each count. In actuality, the Appellant's prior criminal history designated him a Range III, persistent offender as to the counts of attempted murder in the second degree, aggravated kidnapping, and aggravated burglary, and as a career offender as to the count of theft over $1000. Trial counsel testified that he did not object to this incorrect statement of the applicable sentence ranges as they were announced by the trial court and that he did not discuss this error with the Appellant. The Appellant argues on appeal that trial counsel's representation was deficient for failure to correctly advise him of the applicable range for the offenses. However, we conclude that the evidence preponderates in favor of the finding of the post-conviction court that trial counsel advised the Appellant on the corresponding ranges of the underlying offenses, and, further, that the Appellant understood the applicable ranges at the time he pled guilty. Accordingly, the issue is without merit.

> 7. Where there is a dispute between the testimony of [trial counsel] and the [Appellant], the Court credits the testimony of [trial counsel]. Some things said by the [Appellant] simply do not make sense.

Based upon its findings, the post-conviction court denied the Appellant's petition.

Trial counsel specifically stated that he advised the Appellant to enter guilty pleas following jury selection, and this fact is well supported by the record. Moreover, the record clearly demonstrates that multiple criteria were present which allowed the trial court to run the sentences for the four convictions consecutively. The trial court's finding that the Appellant was a professional criminal, a dangerous offender, and an offender whose record of criminal activity was extensive was affirmed, with little difficulty, by this court on direct appeal. *See State v. Michael A. DeGroat, Jr.*, No. M2004-01407-CCA-R3-CD. As noted by this court on direct appeal, the record reflects that the Appellant, who was twenty-nine years old at the time of sentencing, had a criminal history that included eleven felonies. *Id.* The presentence report described the Appellant's work history as "sporadic." *Id.* Furthermore, the record of the Appellant's past and present behavior supported a finding that he was a dangerous offender. *Id.* Under prevailing precedent, and applying the statutory criteria set forth in Tennessee Code Annotated section 40-35-115(b), the chances of the Appellant obtaining concurrent sentences were virtually nil. Thus, we are constrained to hold that trial counsel's advice to Appellant to plead guilty based upon a perceived "excellent legal argument" in favor of obtaining concurrent sentencing constituted deficient performance in this case.

At the post-conviction hearing, trial counsel testified that his strategy in proceeding to trial was designed "to beat the attempted second degree murder charge." Counsel testified that this strategy was based in part upon the victim's statements, "that she wasn't really that hurt" and "that the injury didn't bother her." In support of this defense, counsel had subpoenaed a nurse practitioner and other medical personnel who he believed would corroborate the fact that the victim's injuries were minimal. At the sentencing hearing, counsel similarly argued that the Appellant never intended to either harm, or certainly murder, the victim. Counsel's argument was premised upon: (1) the Appellant's lack of a weapon during the commission of the crimes; and (2) the fact that the Appellant was alone in the residence with the victim for approximately one hour and that during this time, the two engaged in "discussions," the Appellant helped the victim with her groceries, and the victim poured the Appellant a glass of water, each of the events occurring without incident. The police detective who supervised the criminal investigation testified at the sentencing hearing that the Appellant repeatedly insisted during the taped interview that he was not trying to kill the victim, "that he was just trying to get away [and] it was almost in a panic attack, that it was a reaction to [the victim] wanting to call the police rather than something he intended to do all along." At the post-conviction hearing, trial counsel testified that he had intended to introduce into evidence the Appellant's taped statement to the police. The record further demonstrates, however, that trial counsel advised the Appellant to abandon this planned defense and enter guilty pleas after the jury was selected, based merely upon trial counsel's own perceptions regarding the jury pool composition. Counsel testified that after viewing the jury, he "felt very confident that [Appellant] was going to be found guilty of the attempted second degree murder." Trial counsel testified that,

at this point, he approached the State to see whether there was "anything we can do to settle this and the offer was plead open." The post-conviction court in its findings concluded that at this juncture, "[Trial counsel] demonstrated mature judgment by knowing when to call time-out and re-evaluate." We would disagree with this finding. The plausibility of a particular trial strategy should not be contingent upon the composition of the jury, rather, it should be based upon an informed assessment of the facts as applicable to the law. Indeed, in *Strickland v. Washington*, the Supreme Court observed:

> An assessment of the likelihood of a result more favorable to the defendant must exclude the possibility of arbitrariness, whimsy, caprice, "nullification," and the like. A defendant has no entitlement to the luck of a lawless decisionmaker, even if a lawless decision cannot be reviewed. The assessment of prejudice should proceed on the assumption that the decisionmaker is reasonably, conscientiously, and impartially applying the standards that govern the decision. It should not depend on the idiosyncracies of the particular decisionmaker, such as unusual propensities toward harshness or leniency.

Strickland, 466 U.S. at 695, 104 S. Ct. at 2068.

Considering all of the relevant circumstances underlying counsel's advice that the Appellant plead guilty, particularly the counseled rejection of the initial thirty-nine and one-half to forty years plea offer and trial counsel's advice regarding the favorable chances of concurrent sentencing, we hold that this advice constituted deficient performance. *State v. Zimmerman*, 823 S.W.2d 220, 224 (Tenn. Crim. App. 1991) (holding that "the efforts of trial counsel were deficient, not necessarily with respect to preparation or investigation, but by the peremptory abandonment of the pre-established and reasonably sound defense strategy . . . and the cumulative effect of related errors").

In *Hill v. Lockhart*, 474 U.S. at 59, 106 S. Ct. at 370, the Supreme Court held that within the context of a guilty plea, "to satisfy the 'prejudice' requirement, the defendant must show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." First, it is readily apparent from the record before us that if the Appellant had been properly advised that his chances of obtaining concurrent sentences were virtually nil, the Appellant would not have entered "open" guilty pleas to each of the indicted offenses as charged. The Appellant gained nothing by pleading guilty. It is equally apparent that while the attempted murder defense was not overwhelming, nonetheless, we conclude, based upon the record before us, that the defense was viable and had the defense been advanced at trial there is a reasonable probability that the results would have been more favorable to the Appellant than that obtained by the Appellant's counseled guilty pleas. *See Hill v. Lockhart*, 474 U.S. at 60, 06 S. Ct. at 371.

After review, we hold that trial counsel's representation, with regard to the guilty pleas entered by the Appellant in this case, was deficient and that prejudice resulted, thereby establishing a violation of the Appellant's constitutional rights under the Sixth Amendment. We conclude that

the advice of trial counsel regarding the guilty pleas was not within the range of competence demanded of attorneys in criminal cases. *See Baxter*, 523 S.W.2d at 936. The record does not support a showing that the pleas in this case represented "a voluntary and intelligent choice among the alternative courses of action open to the defendant." *See Alford*, 400 U.S. at 31, 91 S. Ct. at 164. Inherent within this holding is our conclusion that the facts preponderate against the post-conviction court's findings. Accordingly, post-conviction relief is warranted.

CONCLUSION

For the foregoing reasons, we hold that the Appellant was denied reasonably effective assistance of counsel. The judgments of conviction are vacated; the case is remanded for reinstatement of all charges, as indicted; and the case is to proceed as provided by law.

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DAVID G. HAYES, JUDGE